

**IN THE UNITED STATES DISTRICT COURT IN AND FOR THE
WESTERN DISTRICT OF OKLAHOMA**

1. COUNTRY MUTUAL INSURANCE)	
COMPANY, an Illinois corporation,)	
)	
Plaintiff,)	Case No. <u>CIV-17-486-R</u>
)	
vs.)	
)	
1. AAA CONSTRUCTION LLC, a/k/a)	
AAA CONSTRUCTION, POOLS, &)	
BUILDINGS, LLC, an Oklahoma)	
limited liability company,)	
)	
Defendant.)	

PLAINTIFF’S COMPLAINT FOR DECLARATORY RELIEF

Plaintiff Country Mutual Insurance Company (“**CMIC**”), for its Complaint for Declaratory Relief, states and alleges as follows:

Jurisdiction and Venue

1. CMIC is an Illinois insurance company which conducts business in the State of Oklahoma.
2. The incident from which this cause of action arises occurred in Logan County, Oklahoma.
3. AAA Construction LLC, a/k/a AAA Construction, Pools, & Buildings, LLC (“**AAA Construction**”) is an Oklahoma limited liability company with its principal place of business located in Oklahoma City, Oklahoma.
4. An action has been filed in the District Court of Logan County, Oklahoma, styled as *Jeffrey T. Shaver, M.D. and Tammy Shaver, Plaintiffs, vs. Timothy Berry d/b/a*

AAA Construction Buildings, Concrete & Landscaping and AAA Construction, Pools & Buildings, L.L.C., Logan County District Court Case No. CJ-2016-167 (“**Logan County Action**”), arising out of alleged negligent construction of a garage and a barn on a property located in Edmond, Oklahoma.

5. On September 19, 2016, the plaintiffs in the Logan County Action filed their original Petition asserting claims against “Timothy Berry d/b/a AAA Construction Buildings, Concrete & Landscaping and AAA Construction, Pools & Buildings, L.L.C.” for: (1) Deceptive Trade Practices; (2) Actual Fraud; (3) Constructive Fraud; (4) Negligent Misrepresentation; (5) Breach of Contract; and (6) Rescission and seek damages in excess of \$75,000.00. *See* Petition for Logan County Action, attached as **Exhibit 1**.

6. On March 16, 2017, the plaintiffs filed their Motion to Amend Petition pursuant to OKLA. STAT. tit. 12, § 2015(A) in the Logan County Action. The proposed Amended Petition was attached as Exhibit 1 to the Motion to Amend. In the Amended Petition, the plaintiffs assert claims against AAA Construction for: (1) Deceptive Trade Practices; (2) Actual Fraud; (3) Constructive Fraud; (4) Negligent Misrepresentation; (5) Breach of Contract; (6) Rescission; and (7) Negligence and seek damages in excess of \$75,000.00. *See* Amended Petition for Logan County Action, attached as **Exhibit 2**.

7. At all times pertinent to the Logan County Action, CMIC had in force and effect its Policy No. AM 9102725-05 (“**Policy**”), in which AAA Construction LLC was its insured.

8. 28 U.S.C. § 2201 and FED. R. CIV. P. 57 allows this Court to declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

9. Jurisdiction and venue are proper with this Court, as this is a civil action between citizens of different states and the matter in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs.

Material Facts

10. The plaintiffs in the Logan County Action, Jeffrey T. Shaver, M.D. and Tammy Shaver (collectively, “**Logan County Plaintiffs**”) entered into two contracts with AAA Construction on October 21, 2015, for the construction of a garage (“**Garage Contract**”) and a barn (“**Barn Contract**”) on a property located in Edmond, Oklahoma (“**Property**”).

11. According to the Logan County Plaintiffs’ Amended Petition, they have paid \$35,304.85 for the Garage Contract. *See* Garage Contract, attached as **Exhibit 3**.

12. The Logan County Plaintiffs further allege that they have paid \$20,000.00 in earnest money for the Barn Contract. *See* Barn Contract, attached as **Exhibit 4**.

13. The Garage Contract and Barn Contract contain the same warranties and provisions. *See* Exhibits 3 and 4.

14. Work began on the Garage Contract on or about June, 2016.

15. On or about July 6, 2016, Sean Craus (“**Craus**”), land representative of Southern Star Central Gas Pipeline, contacted AAA Construction about an infringement upon Southern Star’s utility easement.

16. On September 19, 2016, Shannon and Torres filed the Logan County Action naming Timothy Berry d/b/a AAA Construction and AAA Construction, Pools & Buildings, LLC as Defendants.¹ *See* Exhibit 1.

17. According to the Logan County Plaintiffs' Amended Petition, AAA Construction has not started construction of the Barn which it promised to begin in January, 2016. *See* Exhibit 2.

18. Additionally, the Logan County Plaintiffs allege the design of the Garage is sub-standard as it is incapable of withstanding 120 mph winds, it is not built to industry standard, it is not engineer stamped, and it is not competitively priced. *See* Exhibit 2.

19. The Policy provides for the following coverage:²

BUSINESSOWNERS COVERAGE FORM

* * *

SECTION II – LIABILITY

A. Coverages

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury”, “property damage” or “personal and advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury”, “property damage” or “personal and advertising injury” to which this insurance does not apply. We may, at our discretion, investigate any

¹ Timothy Berry is not a named insured under the Policy.

² Although the Policy contains an endorsement with Oklahoma Changes, the endorsement does not change any of the Policy provisions cited herein.

“occurrence” or any offense and settle any claim or “suit” that may result. . . .

- b. This insurance applies:
 - (1) To “bodily injury” and “property damage” only if:
 - (a) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
 - (b) The “bodily injury” or “property damage” occurs during the policy period.

. . .

E. Liability And Medical Expenses General Conditions

. . .

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the “occurrence” or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and
 - (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.
- b. If a claim is made or “suit” is brought against any insured, you must:
 - (1) Immediately record the specifics of the claim or “suit” and the date received; and
 - (2) Notify us as soon as practicable.You must see to it that we receive written notice of the claim or “suit” as soon as practicable.
- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or “suit”;
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit”; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

See Policy, relevant portions of which are attached as **Exhibit 5**, at Businessowners Coverage Form, Section II—Liability, at Paragraphs (A)(1) and (E)(2).

20. The Policy contains the following relevant definitions:

F. Liability And Medical Expenses Definitions

...

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

If such property can be restored to use by:

- (1) The repair, replacement, adjustment, or removal of "your product" or "your work", or
- (2) Your fulfilling the terms of the contract or agreement.

...

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

...

16. "Products-completed operations hazard":

- a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
 - (1) Products that are still in your physical possession; or
 - (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at the job site has been put to its intended use by any other person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

The "bodily injury" or "property damage" must occur away from premises you own or rent, unless your business includes the selling, handling or distribution of "your product" for consumption on premises you own or rent.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage", or "personal and advertising injury" to which this insurance applies are alleged. . . .

. . .

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

. . . .

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

. . .

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; . . .

See Exhibit 5, at pages 35, 46-47, 49-51.

21. The Policy contains the following relevant exclusions:

B. Exclusions

1. Applicable To Business Liability Coverage

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; ...
- (2) Assumed in a contract or agreement that is an “insured contract”. Provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorneys’ fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”

...

j. Professional Services

“Bodily injury”, “property damage” or “personal and advertising injury” caused by the rendering or failure to render any professional service. This includes but is not limited to:

- (1) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;
- (2) Supervisory, inspection or engineering services;

...

This exclusion applies even if the claims allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by an insured, if the “occurrence” which caused the “bodily injury” or “property damage”, or the offense which caused the “personal and advertising injury”, involved the rendering or failure to render of any professional service.

k. Damage To Property

“Property damage” to:

...

- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

...

l. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

m. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

...

n. Damage To Impaired Property Or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

See Exhibit 5, Section II, at Exclusions, pages 37-38, 40-41.

22. The Policy also contains an exclusion regarding damage to work performed by subcontractors on the insured’s behalf, which states as follows:

**EXCLUSION -- DAMAGE TO WORK PERFORMED
BY SUBCONTRACTORS ON YOUR BEHALF**

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS COVERAGE FORM

Exclusion **1.m.** of **Section II -- Liability, B. Exclusions** is replaced by the following:

- 1. Applicable To Business Liability Coverage** This insurance does not apply to:

m. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard"

See Exhibit 5, Exclusion—Damage to Work Performed By Subcontractors On Your Behalf, BP 14 19 01 10, Page 1.

23. The alleged faulty workmanship of AAA Construction does not constitute an “occurrence” under the Policy and therefore, there is no defense or indemnification coverage under the Policy for the claims asserted against AAA Construction in the Logan County Action.

24. The Policy’s Contractual Liability exclusion precludes defense and indemnification coverage under the Policy for the claims asserted against AAA Construction in the Logan County Action. *See* Exhibit 5, Section II, at Exclusions, Paragraph (b).

25. The Policy’s Professional Services Exclusion precludes defense and indemnification coverage under the Policy for the claims asserted against AAA Construction in the Logan County Action. *See* Exhibit 5, Section II, at Exclusions, Paragraph (j).

26. The Policy’s Damage to Property Exclusion precludes defense and indemnification coverage under the Policy for the claims asserted against AAA Construction in the Logan County Action. *See* Exhibit 5, Section II, at Exclusions, Paragraph (k).

27. The Policy’s Damage to Your Product Exclusion precludes defense and indemnification coverage under the Policy for the claims asserted against AAA

Construction in the Logan County Action. *See* Exhibit 5, Section II, at Exclusions, Paragraph (l).

28. The Policy's Damage to Your Work Exclusion precludes defense and indemnification coverage under the Policy for the claims asserted against AAA Construction in the Logan County Action. *See* Exhibit 5, Section II, at Exclusions, Paragraph (m).

29. The Policy's Damage to Impaired Property or Property Not Physically Injured Exclusion precludes defense and indemnification coverage under the Policy for the claims asserted against AAA Construction in the Logan County Action. *See* Exhibit 5, Section II, at Exclusion, Paragraph (n).

DECLARATORY JUDGMENT

30. Accordingly, an actual, justiciable controversy exists between CMIC and AAA Construction regarding CMIC's obligations under the Policy within the meaning of 28 U.S.C. § 2201.

31. Accordingly, CMIC seeks an Order from this Court determining the rights and obligations of the parties to the insurance contract relative to the Logan County Action.

WHEREFORE, Country Mutual Insurance Company prays that this Court find and declare as follows:

- a. That there is no coverage under Policy No. AM 9102725-05 for the claims asserted in the Logan County Action against AAA Construction;

- b. That Country Mutual Insurance Company has no duty or contractual obligation to defend AAA Construction in the Logan County Action or in any other claim or action which may be brought or asserted as a result of AAA Construction's activities relating to the October 21, 2015 Garage Contract and Barn Contract;
- c. That Country Mutual Insurance Company does not have any duty or contractual obligation to pay for or indemnify AAA Construction for any judgment which might be rendered against it in the Logan County Action or any other claim or action which may be brought or asserted as a result of AAA Construction's activities relating to the October 21, 2015 Garage Contract and Barn Contract;
- d. For such other and further relief as the Court may deem appropriate and proper.

Respectfully Submitted,

WILBURN, MASTERSON & FLEURY

By s/David R. Fleury

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